83-556

No.

In the Supreme Court

OF THE

United States

PRESTO CASTING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

McLAUGHLIN & IRVIN
PATRICK W. JORDAN*
HENRY F. TELFEIAN
333 Market Street, #1050
San Francisco, CA 94105
Telephone: (415) 777-0115
Counsel for Petitioner
Presto Casting Company

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may order Presto Casting Company to execute and enter into a collective bargaining contract that Presto has not voluntarily agreed to, where the Board found a valid impasse existed between the collective bargaining parties.

2. Whether the National Labor Relations Board may modify the terms of an offer made by an employer, making that offer available for later acceptance, notwithstanding prior rejection of that offer, the submission of counter-proposals and a union-led strike.

3. May a three-judge panel overrule prior decisions of the same Circuit.[1]

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[1]Other than those designated in the caption, the only other interested party is United Steelworkers of America, AFL-CIO-CLC. Though a corporation, petitioner neither owns any subsidiaries nor is a subsidiary of any other corporation.

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The petitioner, Presto Casting Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered on September 7, 1983.

CITATION TO OPINION BELOW

The decision of the Court of Appeals is officially reported at 708 F.2d 495 and is printed in the Appendix hereto.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was issued on June 16, 1983, and judgment was subsequently entered on September 7, 1983. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 2, 1983. The petition for certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant parts of Sections 8(a)(5) and 8(d) of the National Labor Relations Act are set forth in the Appendix hereto. No constitutional provisions are implicated.

STATEMENT OF THE CASE

Presto Casting Company operates a metal casting plant in Phoenix, Arizona, and produces parts for the aerospace industry.[1] On November 12, 1980, United Steelworkers of America was certified as the collective bargaining agent for Presto Casting's production and maintenance employees.

Commencing on December 15, 1980, the parties began to negotiate for their first collective bargaining agreement. By February 10, 1981, after a two-day strike, the parties had reached substantial agreement on all non-economic issues. As found by the Ninth Circuit, these non-economic issues were "tentatively resolved, subject to an agreement on economic issues." (Appendix, p. 2.) As an additional element of the February 10 strike settlement, the parties agreed that they would meet again on February 17 and that if they were unable to reach an overall agreement on that date, "all bets were off." Moreover, it was agreed that there would be retroactive application of negotiated wage increases *only* if the parties would reach agreement

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[1]Except where noted, the statement of facts is as set forth in the decision of the Court of Appeals.

on economics by February 18.[3] (ALJD, p. 5, 11. 2-11; Tr. pp. 673, 676; GCX 8.)

When the parties met on February 17, they exchanged a series of proposals and counterproposals covering a wide range of economic topics. Shortly after midnight, the company made its "final final" offer. The Union rejected this offer and made a further counterproposal. Notwithstanding the existence of an impasse, the parties agreed to meet again on February 26.

On February 26, the Union submitted another proposal on economic items, which proposal was rejected by the company. The parties were not negotiating face-to-face, but were using the services of a federal mediator, who was relaying proposals and messages. The company advised the federal mediator that it was withdrawing its prior offer of increased fringe benefits and wage retroactivity, and that while it intended to implement its wage proposals, it would not implement any portion of the fringe benefit package or other non-economic items upon which tentative agreement had been previously reached. (ALJD p. 9, 11. 1-3; Tr. pp. 744-745.) Later that day, Presto unilaterally implemented only that portion of its final offer relating to wages. No retroactive wage payments were made.

On the evening of February 26, the Union conducted a strike vote and the employees, as had the Union, rejected the company's February 17 proposal. The following day

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[3]The Court of Appeals incorrectly states that this agreement was reached at the beginning of bargaining. 708 F.2d at 498. It is undisputed that this statement was made at the conclusion of the February 10 negotiating session. (Tr., p. 679; Brief for the NLRB, p. 21.)

the Union again struck. Two weeks later, the Union ended its strike action and informed the company that it intended to accept the company's February 17 final offer. Presto responded that in light of the Union's previous rejections, its counterproposals, and the strike action, the company's last offer was no longer outstanding and could not be accepted by the Union. Presto agreed to commence bargaining anew, but the Union pressed its NLRB claims.

Both the NLRB and the Ninth Circuit found that the parties had failed to reach a freely negotiated agreement on February 17 and further, that a valid impasse was reached on February 26. Nevertheless the NLRB ordered the company to execute a written agreement incorporating its previously-tendered February 17 offer, thereby modifying the terms of that offer, for the purpose of compelling agreement where none existed.

REASONS FOR GRANTING THE WRIT

The Board's decision and the Ninth Circuit's affirmance jettison the centuries-old common law rule that a contract offer is revoked upon rejection or the making of a counteroffer. 1 *Williston on Contracts*, § 50A. There can be no dispute that the general rules of offer and acceptance have been adopted by labor and management alike, and have been followed since the inception of collective bargaining in the United States. In its place, the Board substitutes the rule that an offer "may be accepted within a reasonable time unless (i) it was expressly withdrawn; (ii) it was made expressly contingent on a condition subsequent; or (iii) circumstances intervening between offer and purported acceptance would characterize the latter as simply

unfair." (Appendix, p. 5.) As will be shown below, this hypertechnical rule has both the direct and indirect effect of allowing the Board to govern the substance of offers tendered in the collective bargaining arena, thereby imposing its will upon the substance of bargaining agreements.

Since the inception of the National Labor Relations Act (NLRA), employers have been required to bargain in good faith with unions. In 1947, the Taft-Hartley Act amended the NLRA to obligate both unions and management to bargain in good faith. Section 8(d) was added for the purpose of explicitly defining the duty to bargain as the obligation to meet at reasonable times and confer in good faith on terms and conditions of employment. The legislative history plainly shows that Congress was deeply concerned with prior decisions of the Board, which in effect required an employer to make or offer concessions before the Board would find that the employer was bargaining in good faith. Accordingly, it was expressly provided that the obligation to bargain, as required by Section 8(a)(5), did not include an obligation to agree to any particular proposal or the making of concessions. H.R. Rep. No. 245, 80th Cong. 1st Ses. 19-20 (1947). H.R. Rep. No. 510, 80th Cong. 1st Ses. (1947). *See also H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

In construing the necessary interrelationship between Sections 8(a)(5) and 8(d) of the NLRA, this Court has repeatedly held that the Act does not compel that agreements be reached between employers and unions. To the contrary, each side retains its inherent freedom of contract and the right to determine for itself the terms and condi-

tions of an agreement, if any, that can be reached. *Carbon Fuel Co. v. Mineworkers,* 444 U.S. 219 (1979); *Ford Motor Co. v. NLRB,* 441 U.S. 499 (1979); *NLRB v. Burns Intl. Security Services,* 406 U.S. 272 (1972); *H. K. Porter v. NLRB, supra.* In that regard, the Court has held that an overriding policy of Section 8(d) was to foster free collective bargaining without governmental regulation or compulsion to agree to any particular proposal. *Carbon Fuel Co. v. Mineworkers, supra.*

Consistent with that analysis, this Court has expressly held that the Board's remedial powers are limited by the same considerations that led to the enactment of Section 8(d). *H. K. Porter Co. v. NLRB, supra.* Where the Board may not rely upon the simple act of failing to agree to find a violation of Section 8(a)(5), likewise it may not compel agreement in that same dispute.

This overriding congressional intent has been reaffirmed by the Court in several significant decisions. First, in *NLRB v. American Ins. Co.,* 343 U.S. 395 (1952), the Board contended that it was a *per se* violation of the Act for an employer to seek a broadly-based management rights clause for the reason that such a clause would allow an employer to set various terms and conditions of employment. The Board argued to the Court that employers must agree to include in a contract provisions establishing fixed standards for various conditions of employment. In rejecting this argument the Court observed that Section 8(d) does not allow the Board to pass upon the desirability of substantive terms contained in collective bargaining agreements. Further, the Act does not require any party to engage in "fruitless marathon dis-

cussions," where agreement cannot be reached. Moreover, the Board may not, either directly or indirectly, compel concessions so as to interfere with the parties' inherent freedom of contract and the right to make their own agreements. 343 U.S. at 404. Likewise, in *NLRB v. Insurance Agents,* 361 U.S. 477, 487 (1960), the Court held that Congress through its enactment of Section 8(d) sought to prevent the Board from controlling the terms of collective bargaining agreements. Thirdly, in *NLRB v. Burns Intl. Security Services, supra,* the Board argued that a successor employer was obligated to follow a collective bargaining agreement executed by a predecessor. This contention was again rejected by the Court as it observed that such a position violated the very premise of the Act which is bargaining freedom, and freedom from having contract provisions imposed against either party's will. Although it is well-established that the Board is entitled to construe the Act, deference is not warranted where the Board fails to follow the underlying purpose of the statute or attempts to enter into new areas of regulation which Congress expressly precluded it from doing. *Ford Motor Co. v. NLRB, supra.*

Pursuant to the policy of freedom of contract and the requirement of mutual assent, the Board has long followed the common law rules of offer and acceptance to determine whether a "meeting of the minds" has been reached. *T. M. Cobb Co.,* 224 NLRB 694 (1976); *Lane Construction Corp.,* 222 NLRB No. 194, 91 LRRM 1337 (1976); *Lucas County Farm Bureau,* 218 NLRB 1155 (1976); *Loggins Meat Co.,* 206 NLRB 303 (1973); *Big John Food King,* 171 NLRB No. 197, 68 LRRM 1273 (1968). Absent a showing of offer, acceptance, and *mutual assent,* the NLRB is prohibited by

Section 8(d) from imposing a contract on the bargaining parties. *NLRB v. Sumner Home for the Aged*, 599 F.2d 762 (6th Cir. 1979); *NLRB v. Bus Co., Inc.*, 578 F.2d 472 (3rd Cir. 1978); *NLRB v. H. Koch & Sons*, 578 F.2d 1287 (9th Cir. 1978); *NLRB v. Downs-Clark, Inc.*, 479 F.2d 546 (5th Cir. 1973); and *Genesco, Inc. v. Joint Council 13*, 341 F.2d 482 (2nd Cir. 1965); *but see Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87 (8th Cir. 1981).

The Board's instant abrogation of the common law of offer and acceptance is in direct conflict with the Seventh Circuit's decision in *Means & Co. v. NLRB*, 377 F.2d 683 (7th Cir. 1967) and previous decisions of the Ninth Circuit. *United Steelworkers of America v. Bell Foundry Co.*, 626 F.2d 139 (9th Cir. 1980), and *Lozano Enterprises v. NLRB*, 327 F.2d 814 (9th Cir. 1964). While hypertechnical rules of contract law do not govern collective bargaining agreements, it has been well-established that the normal rules of offer and acceptance are determinative of the existence of a bargaining agreement. *Means & Co. v. NLRB, supra;* and *Lozano Enterprises v. NLRB, supra.* Less than four years ago, the Ninth Circuit in *United Steelworkers of America v. Bell Foundry Co., supra,* in the context of a Section 301 action, expressly held that modification of an offer operates as a revocation of that offer. A similar holding may be found in *Teamsters Local 524 v. Billington*, 402 F.2d 510, n. 2 (9th Cir. 1968), in which that court held that normal rules of offer and acceptance govern collective bargaining.

In the instant case, the Board asserts that it has merely redefined the rules of offer and acceptance by imposing its regulation that unless an offer is expressly withdrawn, it remains open-ended even though it has been previously

rejected. The rationale for this new "rule" is that there is a difference between the collective bargaining arena and the negotiation of commercial contracts and further, that collective bargaining parties are compelled to deal with each other. Remarkably, the Board seems to forget that the fundamental basis for the enactment of the NLRA was Congress' desire to provide for labor peace so as not to obstruct *commerce* and the free flow of *commerce*. Additionally in *Inland Steel Co.*, 9 NLRB 783 (1938), and *St. Joseph Stockyards*, 2 NLRB 39 (1936), the Board found that it was an unfair labor practice for employers to refuse to sign an agreement embodying the terms negotiated, even though such a requirement was not then contained in the Act. The basis for these decisions was that it was customary in commercial settings to have a written agreement which outlined the duties and responsibilities of the contracting parties, and the unions' request for written agreements was consistent with what any "prudent businessman would expect." Indeed, this argument lies at the heart of the Court's decision in *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941), where the Court observed that a businessman who refused to put his commitments in writing could not expect to be found to have bargained in good faith by that refusal and accordingly, the same rationale should be applied to an employer, who by his refusal to sign apparently would not honor his verbal commitments. Given this history, the Board may not properly contend that there is a meaningful distinction, for purposes of offer and acceptance, between commercial contracts and collective bargaining agreements. Moreover, the general principles of offer and acceptance were uniformly followed at the time of the enactment of the NLRA and

Taft-Hartley, and were thereby a part of the concept of collective bargaining with which Congress dealt.

There is no dispute, and it was reaffirmed by the Ninth Circuit, that the parties reached a bona fide impasse on February 26, and could not conclude a voluntary agreement. There was nothing in the written "final final" offer which extended it on into infinity or granted the Union an opportunity, at its whim, to test the strike waters and then return to the bargaining table unscathed. Thus, simply because the parties must deal with each other, this does not mean that the Board has the authority to break the logjam by redefining the terms of an offer submitted by Presto, to suit its purposes of compelling an agreement. Significantly, the Ninth Circuit affirmed that the parties reached agreement on a ground rule that " 'all bets were off' if the negotiations broke down." (Appendix, p. 5.) In redefining the "parties' expectations" vis-a-vis these plain words, the Board has rewritten Presto's final offer to include a term that would make it available for union acceptance within a reasonable period of time. As a result, the Board is now attempting to fashion a rule that all offers are available for later acceptance, notwithstanding rejection and the submission of counterproposals thereto, unless the offer has been expressly withdrawn in a form and fashion acceptable to the Board. Such a rule does *not* involve the mere establishment of procedures to be followed by the parties, nor is the Board simply observing the process of collective bargaining. Rather, the Board seeks to participate in the substance of collective bargaining by dictating the terms of an offer, i.e., the length of time within which that offer may be accepted, irrespective

of prior rejections or the submission of counterproposals. This meddling in the substantive aspects of collective bargaining, which of necessity compels a concession by an employer to a union whereby its offer is extended indefinitely absent express withdrawal on terms acceptable to the Board, is contrary to the policy of the Act in general and is in direct conflict with the remedial limitations placed upon the Board by Section 8(d). Once a union has rejected an employer's offer, the Board has no authority to require that the employer expressly withdraw its offer or run the risk of having a union accept that offer at a later time. If a valid impasse has been reached, it is the collective bargaining parties who must determine the conditions under which they will continue bargaining, and not the Board. The Board's instant policy of requiring the express withdrawal of offers or suffer the consequences of an open-ended offer is no different than requiring that specified terms and conditions of employment must be addressed and incorporated into an agreement. Cf. *NLRB v. American Ins. Co., supra.*

The Ninth Circuit's decision not only improperly abolishes the need for mutual assent, but also conflicts with its own developed case law. This intra-circuit conflict goes unexplained, as the Court's decision fails to cite or discuss either *Bell Foundry* or *Billington,* despite the Circuit's acknowledged position that the doctrine of *stare decisis* prevents the Court from overruling a previous panel decision. *Royal Development Co. v. NLRB,* 703 F.2d 363 (9th Cir. 1983).

From a practical standpoint, the Board's decision is inherently contradictory and has the effect of placing em-

ployers in an untenable position. Thus, while the Board asserts that it permits an employer to withdraw an offer prior to acceptance, it has also promulgated a nearly *per se* rule that such withdrawals, without good cause, are violative of Section 8(a)(5) of the Act. E.g. *Randle-Eastern Ambulance Service, Inc.*, 230 NLRB 542 (1977), *enf. den. in relevant part* 584 F.2d 720 (5th Cir. 1978). In the absence of an acceptable explanation, the Board uniformly refuses to permit an employer to retract an outstanding offer. *Compare Pittsburgh-Des Moines Steel Co.*, 235 NLRB 666 (1980), *enf. den.* 663 F.2d 956 (9th Cir. 1981), with *Times-Herald*, 249 NLRB 13 (1980). Similarly, various Courts of Appeal have also found a violation of Section 8(a)(5) where an offer was withdrawn prior to imminent acceptance. *Mead Corp. v. NLRB*, 697 F.2d 1013 (11th Cir. 1983); and *NLRB v. Ramona's Mexican Food Products Inc.*, 531 F.2d 390 (9th Cir. 1975). *See also NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343 (9th Cir. 1978). Stated otherwise, the Board asserts that it may adopt a procedural rule requiring the withdrawal of offers. However, that procedural rule becomes one of substance for the reason that the simple act of following the Board's procedure subjects the employer to independent liability under Section 8(a)(5) for having withdrawn an offer. What the Board gives with one hand, it takes back with the other. It is readily apparent that the Board's rewriting of Section 8(d), to serve its own purposes and to force agreements where none can be had, will result in brinksmanship rather than industrial peace.

Employers and unions are entitled to rules which will lend certainty to the negotiating process and ensure that a

meeting of the minds has occurred. This was correctly observed by the Seventh Circuit in *Means & Co. v. NLRB, supra,* where it held that industrial peace can best be served by following rules which are calculated to afford some degree of certainty in collective bargaining. The Court refused to accept the Board's deviation from general principles of contract law and its failure to justify such an attempt.

The common law rules governing offer and acceptance require nothing more than the simple acts of offering, accepting, or rejecting proposals. They do not require tendering offers in a certain form, conditioning those offers upon various events, or dictating the length of time those offers are available for acceptance notwithstanding prior rejection. By imposing a requirement that offers be expressly withdrawn or limited to a specified duration, the Board has compelled the making of a concession, and has injected itself into the formulation of offers. Such offers form the basis of the terms and conditions ultimately to be agreed upon by the parties through mutual assent. Accordingly, the Board has entered the bargaining process in a direct and meaningful fashion which will necessarily have an impact upon substantive agreements reached by collective bargaining parties. The Board may not use this indirect or veiled approach to accomplish that which it may not do directly.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated: September 29, 1983.

Respectfully submitted,

McLaughlin and Irvin
Patrick W. Jordan
Henry F. Telfeian

By Patrick W. Jordan
Attorneys for Petitioner
Presto Casting Company

(Appendices follow)

Appendix A

United States Court of Appeals,
Ninth Circuit

No. 82-7386

Presto Casting Company,
Petitioner,

v.

National Labor Relations Board,
Respondent.

On Petition to Review a Decision of the
National Labor Relations Board

Before HUG and FARRIS, Circuit Judges, and
GADBOIS,* District Judge

GADBOIS, District Judge:

This matter is before the court on the petition of Presto Casting Company to review and set aside an order of the National Labor Relations Board, and the cross-application of the Board for enforcement of the order. Both petitions were timely filed and jurisdiction is afforded by 29 U.S.C. § 160(e) and (f).

Presto is a metal casting firm which operates a foundry and heat treating plant in Phoenix, Arizona. On November 12, 1980, the Board certified the United Steelworkers of America as the collective bargaining representative of Presto's production and maintenance employees. Commencing on December 15, 1980 and through February 26,

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*The Honorable Richard A. Gadbois, Jr., United States District Judge, Central District of California, sitting by designation.

1981, the parties met a number of times for the purpose of negotiating a collective bargaining agreement. At Presto's insistence, the parties treated non-economic and economic matters separately. Initial negotiations were limited to non-economic items. Negotiations broke down when a personality problem developed between Garza, negotiator for the company, and Smith, the union spokesman. On February 10, 1981, the union met with Presto's new negotiator, Long. The latter had prepared a draft of the company's non-economic proposal and presented it to the union. After some revisions the non-economic issues were tentatively resolved, subject to an agreement on economic issues.

On February 17, Long presented the company's economic package to Smith. During the course of a marathon bargaining session, the parties exchanged proposals and counter-proposals covering a wide range of economic issues. Late in the meeting Long submitted his "final final" offer. The union made a counter-proposal which Long rejected. The union again proffered a counter-proposal, but Long reiterated that Presto had made its ultimate offer. The parties agreed to meet again on February 26. At that meeting the union gave Presto another proposal on economic matters, but again Long rejected it. That evening the union conducted a strike vote. The employees rejected the Presto proposal. A strike commenced on February 27 and lasted until March 6. Smith decided to terminate the strike on March 6 because a majority of the employees had in fact returned to work. A union mailgram accepting the company's final offer was sent on the afternoon of March 6. Garza, who had earlier heard of the union's acceptance,

informed Long that the union was accepting the company's offer. Long notified the federal mediator that he wanted the proposal withdrawn from the bargaining table. The union mailgram was received at Presto on March 7. Acting on the union's March 6 acceptance of the agreement, those employees who had remained on strike reported to the company's main plant on March 9, unconditionally seeking reinstatement. Presto has refused to acknowledge existence of an agreement or to conform to any of its provisions.

At various relevant times the union filed with the Board unfair labor practice charges which complained of Presto's:

> (i) failing to acknowledge and sign the March 6 "agreement" with the union; (Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (5))
>
> (ii) failing to reinstate economic strikers who had not been permanently replaced; (Sections 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3))
>
> (iii) unilateral discontinuance during negotiations of the company's past practice of holiday distributions; (Sections 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5))
>
> (iv) requiring returning economic strikers to sign a company-prepared request for reinstatement.

The Administrative Law Judge found for the union on these charges. The Board affirmed the ALJ's findings of fact and conclusions of law and adopted his recommended order.

The principal issue in this case is whether the Board erred in finding that Presto's final contract offer was still susceptible of acceptance on March 6, notwithstanding that it was subjected to two counteroffers and a rejection, fol-

lowed by a strike. The law is clear that we must affirm a decision of the Board which relies on findings of fact supported by substantial evidence. *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 876 (9th Cir.1978); and *Capitol-Husting Co., Inc. v. NLRB*, 671 F.2d 237, 242-243 (7th Cir. 1982).

Presto urges us to apply general legal principles of contract formation and to hold that counteroffers, rejections and a subsequent change of relative bargaining positions in favor of the offeror constitute withdrawal of the offer and that a purported acceptance thereafter is wholly ineffective. Indeed, this court, in *Lozano Enterprises v. NLRB*, 327 F.2d 814, 819 (9th Cir.1964), stated:

> We do not at all mean to hold that, in general, the normal rules of offer and acceptance are not determinative as to whether an agreement has been reached in a collective bargaining situation . . .

As *Lozano* observes, however, strict reliance on that generality is an overly simplistic approach.[1] The more considered view is that adopted in *Pepsi-Cola Bottling Co., Etc. v. NLRB*, 659 F.2d 87 (8th Cir.1981). There the court confronted a situation in which the employer refused to acknowledge an agreement based on its own proposal, which was initially rejected but accepted shortly thereafter. The court noted that technical rules of contract formation do not confine collective bargaining, because the parties are obliged by their relationship to deal exclusively with each other and because policies of the Act dictate that

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[1]Lozano holds that intentional failure to deliver a written contract signed by the parties is ineffective to bar its enforcement. 327 F.2d at 819.

this process not be encumbered by undue formalities. *Id.* at 89. *Pepsi-Cola* held that an offer is not automatically terminated by rejection or counter-proposal. Rather, it may be accepted within a reasonable time unless (i) it was expressly withdrawn; (ii) it was made expressly contingent on a condition subsequent; or (iii) circumstances intervening between offer and purported acceptance would characterize the latter as simply unfair. *Id.* at 89-90. We now adopt that holding as the law of this Circuit.[3]

Applying the above rule to the facts in this case, we find that substantial evidence supports the Board's conclusion that Presto's offer was not withdrawn. The company makes much of the ground rules set at the beginning of the bargaining between Long and Smith, at which time it was agreed that "all bets were off" if the negotiations broke down. It certainly could be implied that any company offer on the table when negotiations terminated was automatically revoked. The Board determined otherwise, however, and it has the expertise to determine the reasonable expectations of the parties during the period in issue. The "all bets are off" statement was made early in the bargaining process and was not used in connection with the impasse reached on February 26. Further, there is some evidence that Presto itself thought that the offer was still open. When Long heard on March 6 that the union had sent a mailgram of acceptance, he tried expressly to withdraw the offer.

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[3]This rule is fully consistent with decisions of this court dealing with contract formation in the context of labor relations. See *Lozano Enterprises v. NLRB*, 327 F.2d at 818-19; NLRB v. *Electra-Food Machinery, Inc.*, 621 F.2d 958, 958 (9th Cir.1980); and *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138, 141-42 (9th Cir.1976), *cert. den.*, 429 U.S. 895, 97 S.Ct. 257, 50 L.Ed.2d 179.

Presto complains that the Board's order is unfair, since it takes away the economic advantage earned by its having weathered the strike. The decision in *Pepsi-Cola Bottling Co., Etc. v. NLRB,* correctly states the rule that a mere change in bargaining strength does not create such unfairness as to negate acceptance. 659 F.2d at 90.

The Presto offer, which was not contingent on a subsequent condition, was never the subject of an effective express withdrawal. It was accepted within a reasonable time, and the intervening events do not render recognition of the agreement as unfair. Whether the agreement was in fact reached by the parties is a question for the Board to determine. *Capitol-Husting Co., Inc. v. NLRB,* 671 F.2d at 243. Since the Board's determination in this case is supported by substantial evidence we cannot declare the same to be erroneous, even if we might reach a different conclusion on the same evidence. *Id.; accord, NLRB v. Nevis Industries, Inc.,* 647 F.2d 905, 908 (9th Cir.1981).

The second issue raised by Presto's appeal concerns its alleged failure timely to reinstate several economic strikers. Presto complains of the Board's finding of such failure in that the issue was not raised in the complaint against it. It is clear that the Board may find an unfair labor practice even though not specifically charged in the complaint, if in fact the issue has been fairly and fully litigated. *Alexander Dawson, Inc. v. NLRB,* 586 F.2d 1300, 1304 (9th Cir.1978). Here, the complaint charged Presto with unfair labor practices connected with the strike itself. Presto was not prepared at the hearing to come forward with valid reasons for failure to reinstate economic strikers. Under these circumstances Presto did not have the opportunity to litigate

the issue fairly, and enforcement of the Board's order in this respect must be denied.

The remaining issues involve Board determinations that Presto violated the Act by requiring returning workers to sign a reinstatement form and unilaterally abolishing a minor employee benefit. We affirm these orders. On the first issue, there was substantial evidence to support the finding that reinstatement was conditioned upon signing the form. When the striking employees made an unconditional offer to return to their employment, Presto was obligated to make them an unconditional offer of reinstatement. *See Shelly & Anderson Furniture Mfg. Co., Inc. v. NLRB,* 497 F.2d 1200, 1204 (9th Cir.1974). With respect to the employee benefit situation, Presto concedes technical violation of the Act but argues that it was *de minimis* and later cured. The remedial authority of the Board, however, is broad and discretionary, and it is not an abuse of discretion to make an order to deter future misconduct despite a claim of compliance. *NLRB v. Gissel Packing Co., Inc.,* 395 U.S. 575, 612 n. 32, 89 S.Ct. 1918, 1939 n. 32, 23 L.Ed.2d 547.

Enforcement of the Board's order is granted in part and denied in part.

Appendix B

United States Code, Title 29, Section 158(a)(5)

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

United States Code, Title 29, Section 158(d)

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .